



The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 04-52

June 29, 2004

Investigation by the Department of Telecommunications and Energy on its own motion as to the propriety of the rates and charges set forth in the following tariffs: The Berkshire Gas Company, M.D.T.E. Nos. 343 through 349, filed on May 14, 2004, to become effective September 1, 2004.

HEARING OFFICER RULING ON MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

On May 14, 2004, The Berkshire Gas Company ("Company") submitted certain background materials in support of its first annual price cap mechanism rate adjustment filing. The Company has filed a motion for a protective order ("Motion") with respect to these materials. The Company claims that these materials pertain to security procedures implemented in response to the events of September 11, 2001, vulnerability assessments of the Company's security measures, and terrorist threat assessments and responses. The Company argues that these materials are exempted from the definition of "public records" (Motion at 3, citing G.L. c. 4, § 7, cl. twenty-sixth (n)). The Company further argues that protection of these documents from public disclosure is necessary to protect the public health and safety (*id.*). Therefore, the Company requests that the Department issue a protective order for these materials pursuant to G.L. c. 25, § 5D.

II. STANDARD OF REVIEW

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

[T]he [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the Department shall protect only so much of the information as is necessary to meet such need.

General Laws c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data, regardless of physical form or characteristics, received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth (a) (“specifically or by necessary implication exempted from disclosure by statute”).

General Laws c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute “trade secrets, confidential, competitively sensitive or other proprietary information”; second, the party seeking protection must overcome the G.L. c. 66, § 10 statutory presumption that all such information is public information by “proving” the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

III. ANALYSIS AND FINDINGS

First, I find that all of the documents for which the Company seeks confidential treatment, except for three documents as discussed specifically below, pertain to security measures, emergency preparedness, threat or vulnerability assessments, and security procedures. Therefore, these documents constitute confidential information.

Second, the Company has demonstrated that public disclosure of these documents would jeopardize public safety. Therefore, I find that the Company has proven a need for their non-disclosure. Moreover, subsection (n) of G.L. c. 4, § 7, cl. twenty-sixth provides an exemption from the definition of “public records” for:

records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under subsection (b) of section 10 of chapter 66, is likely to jeopardize public safety.

Because these documents fall within the exemption of subsection (n), they are not “public records.” Thus, the presumption of G.L. c. 66, § 10 that the information is public information does not apply.

Third, while the Department may limit the period that a document may be protected where the need for protection is limited in duration, the potential harm to public safety from release these documents will not diminish with the passage of time. Therefore, I find that the documents should be protected indefinitely, not subject to a sunset provision.

Finally, I find that three documents should not be accorded protective treatment. The first document is entitled “Pipeline Security Information Circular; Terrorism Threat Advisory,” issued September 11, 2001. The document merely contains a summary of the terrorist acts of September 11, 2001 that were widely reported in the media as well as a general exhortation to employees to be alert to “unusual activity,” without reference to any specific security measures to be taken. The second document is entitled “National Infrastructure Protection Center; Increased Cyber Awareness Advisory 01-020,” issued September 14, 2001. This advisory was publicly issued by the federal government. The third document is a copy of two articles from the Boston Globe and the Daily Hampshire Gazette, dated September 18, 2001. Newspaper articles are by nature not sensitive documents. Public disclosure of the foregoing documents will not harm the public safety, and in the case of the latter two documents, the documents are already available to the public.

IV. RULING

For the foregoing reasons, the Company’s Motion for a protective order is GRANTED with respect to all documents attached to the Company’s Motion, except for the three documents discussed above.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation by July 12, 2004. Any appeal must include a copy of this Ruling.

/s/
Jesse S. Reyes, Hearing Officer